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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 95M-72
 50997

In Matter of)	WT DOCKET NO. 94-147
)	
JAMES A. KAY, JR.)	
)	
Licensee of one hundred sixty)	
four Part 90 licenses in the)	
Los Angeles, California area.)	

MEMORANDUM OPINION AND ORDER

Issued: March 13, 1995 ; Released: March 15, 1995

Background

1. An Application For Review was addressed to and filed with the Commission by James A. Kay, Jr. ("Kay") on January 12, 1995. An Opposition was filed and submitted to the Commission by the Wireless Telecommunications Bureau on January 27, 1995. On February 03, 1995, the pleadings were referred to the Presiding Judge by the General Counsel for consideration in light of the provisions of Section 1.115(e) of the Rules Of Practice concerning certification to the Commission.¹ On February 06, 1995, the Bureau filed an Opposition addressed to the Presiding Judge. The Presiding Judge ruled that Kay had failed to request certification within the prescribed time and that the passage of time resulting from Kay's erroneous filing with the Commission precluded a certification of the questions. See Memorandum Opinion And Order FCC 95M-44, supra released February 10, 1995.

2. On February 10, 1995, Kay submitted to the Presiding Judge a Request For Permission To File Interlocutory Appeal to the Review Board. The appeal sought is from the Judge's ruling in FCC 95M-44, supra that Kay had failed to seek timely the certification to the Commission of an issue regarding an Erratum to the Hearing Designation Order.² That request was denied because there was pending a parallel request for reconsideration by the General Counsel of his ruling on certification. Therefore, the issue was not ripe for consideration by the Presiding Judge of a Request For an Interlocutory Appeal to the Review Board. See Order 95M-56, released February 22, 1995.

¹ See Order FCC 95I-06, released February 03, 1995. The pleadings were erroneously submitted to the Commission. The General Counsel noted that the Rules Of Practice require a presiding Administrative Law Judge to rule or certify the question in the first instance. 47 C.F.R. §1.115(e)(3) (applications for review of actions taken pursuant to delegated authority).

² Order To Show Cause, Hearing Designation Order, And Notice Of Opportunity For Forfeiture, FCC 94-315, released December 23, 1994 ("Hearing Designation Order") and Erratum m:mco 51344, released December 23, 1994.

3. The General Counsel has now determined that Kay's Request For Reconsideration should be denied. See Order FCC 95I-07, released March 8, 1995. Thus, it is appropriate to consider at this time Kay's Request For an Interlocutory Appeal that was filed on February 10, 1995.

Facts

4. Kay requests permission to take an interlocutory appeal to the Review Board on the Presiding Judge's ruling that Kay had failed to request timely a certification to the Commission within five days of the release of the Hearing Designation Order. Memorandum Opinion And Order, FCC 95M-44, supra. The Presiding Judge had determined that the question was controlled by the Commission's regulation at 47 C.F.R. §1.115(e)(3) which provides that applications for review of hearing designation orders shall be deferred for appeal until after a final Review Board decision unless the Presiding Judge certifies the question to the Commission. Also, it was held that there may be no certification unless the request is made to the Presiding Judge within five days of the release of the Bureau's Erratum to the Hearing Designation Order. Id.

5. The Rule specifically states that:

[a]pplications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission.

47 C.F.R. §1.115(e)(3). (Emphasis added.) Kay asserts that the five day limit does not apply here because the Hearing Designation Order was issued by the Commission and not by the Bureau pursuant to a "delegated authority." But the Erratum was issued by the Bureau's Deputy Chief pursuant to delegated authority. The General Counsel has ruled that §1.115(e)(3) applies to the review of the Erratum. See General Counsel's Order FCC 95I-06, released February 03, 1995, and General Counsel's Order FCC 95I-07, supra. There is no basis for questioning that legal conclusion in an interlocutory appeal to the Review Board. Cf. Atlantic Broadcasting Company, 5 F.C.C. 2d 717, 721 (Comm'n 1966); Frank H. Yemm, 39 Radio Reg. 2d (P&F) 1657 (Comm'n 1977); Fort Collins Telecasters, 403 F.C.C. 2d 978, 983 (Review Bd. 1986).

Discussion

6. Underlying Kay's Request For an Interlocutory Appeal are his continued assertions that there is no evidence of a Commission delegation of authority to the Wireless Telecommunications Bureau and that therefore the Erratum to the Commission's Hearing Designation Order, which was issued by the

Bureau's Deputy Chief, was not an authorized delegated action.³ However, there is a presumption of regularity of the Commission's procedures and there is no need to produce proof of Commission delegation in addition to the indicia of regularity that already exist in the record. The fact is established that prior to the Hearing Designation Order and its Erratum, the Commission had publicly announced the formation of the Wireless Telecommunications Bureau which assumed all of the functions and related powers of the former Private Radio Bureau. See Presiding Judge's Memorandum Opinion And Order FCC 95M-24, released January 30, 1995 (argument rejected that there was no proper Commission authorization for the establishment of the Bureau). Kay has not asserted that the Commission lacked authority to issue the Hearing Designation Order. Nor is it contested that the Commission has the statutory power to reorganize. 47 U.S.C. §5(b). Since all of the authority delegated to the former Private Radio Bureau had passed to the Wireless Telecommunications Bureau, it is an inescapable conclusion that the Wireless Telecommunications Bureau had the same delegated authority to issue an Erratum as once had the former Private Radio Bureau.⁴

7. The Commission's rules provide that interlocutory rulings of Administrative Law Judges are appealable to the Review Board only if the appeal is allowed by the Presiding Judge. 47 C.F.R. §1.301(b). The request for such an appeal must be filed within five days of the release of the ruling and the request must contain:

a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

Id. The ruling from which Kay now seeks to take an interlocutory appeal was released on February 10, 1995. See Memorandum Opinion And Order, FCC 95M-44, supra. There the Presiding Judge found that Kay's request for certification was deficient due to the passage of time. The General Counsel has twice ruled that the rule requiring a five day request for certification of challenges to hearing designation orders [47 C.F.R. §1.115(e)(3)] applies to the Erratum.

³ One underlying question sought to be raised by Kay on appeal is whether the Bureau had acted "ultra vires" in issuing the Erratum. A second underlying issue sought for appeal is whether the Bureau violated Section 1.221 of the Commission's Rules of Practice in substituting the Wireless Telecommunications Bureau for the former Private Radio Bureau as a named party to this proceeding. An interlocutory appeal on those issues has already been denied. Memorandum Opinion And Order, FCC 95M-24, released January 30, 1995.

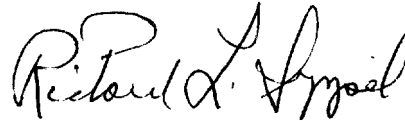
⁴ The Erratum changed a docket number, identified the Chief of the Wireless Telecommunications Bureau as a party where previously the Chief of the former Private Radio Bureau was identified as the party, and inserted language which tracked the Hearing Designation Order to reflect a "Notice of Opportunity for Hearing for Forfeiture". Thus, there were no substantive changes made to the Hearing Designation Order.

The arithmetical computation showing that Kay's request to certify failed to meet the five day requirement is a self-evident fact. Thus, there is no new or novel question of law or policy that was set by the Presiding Judge in FCC 95M-44 and there is no error shown that would be likely to require a remand should the interlocutory appeal be denied. Therefore, there will be no permission granted for Kay to take an interlocutory appeal.

Ruling

Accordingly, IT IS ORDERED that the Request For Permission To File Interlocutory Appeal that was filed by James A. Kay, Jr. on February 10, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Richard L. Sippel".

Richard L. Sippel
Administrative Law Judge